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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73 - 210

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

BYRON N. SCOTT, Respondent.

SUPPLEMENTAL BRIEF
In Support of
PETITION FOR A WRIT OF CERTIORARI
to the District of Columbia Court of Appeals

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Petitioner requests that the Court consider the following additional representations and argument in support of his Petition for a Writ of Certiorari.

I. THE FEDERAL OMNIBUS CRIME CONTROL ACT OF 1968 PREEMPTED ALL STATE LEGISLATION REGARDING THE RECORDING OF TELEPHONE CONVERSATIONS.

Respondent may well argue, as he did in the Appellee's Brief before the District of Columbia Court of Appeals, that "reception of the tapes would have put F [Frommhagen] in violation of Title 23-542 of the District of Columbia Code (1967 Ed.)," and may continue to ignore the fact that the District of Columbia Code was amended in 1970 to conform to the provisions of the 1968 Federal Omnibus Crime Control Act. Section 23-542(b)(3) of the District of Columbia Code (1970 Ed.) is a replica of Section 2511(2)(d), 18 U.S.C.,

wherein it is stated that it is not unlawful for a telephone conversation to be recorded with the consent of only one party to the conversation unless such interception is made for the purpose of committing any criminal or tortious act. The recordings of the telephone conversations at issue were made in the summer of 1971 and disclosure to the courts was attempted in May of 1972; clearly the petitioner was not in violation of any District of Columbia law.

If there was ever any doubt as to the legality of recording telephone conversations in California under the Invasion of Privacy Act at Section 632 of the California Penal Code, that doubt was erased by the California Supreme Court in Halpin v. Superior Court of San Bernardino County (1972), 495 P2d 1295. In that decision the Court, noting the very language of the Federal Omnibus Crime Control Act at Section 2510(1), 18 U.S.C. and the intent of Congress, ruled that said Act at 18 U.S.C., Section 2510 et seq. preempted the state legislation. Inasmuch as Section 2510(1), 18 U.S.C., defines "wire communication" as "any communication made...through the use of facilities...furnished or operated by...a common carrier...for the transmission of interstate or foreign communications" it is obvious that all existing federal and state legislation was preempted by that comprehensive national legislation.

Respondent never brought to issue in the Courts below whether Frommhagen's acts in recording and attempting to disclose those recordings was done to commit a criminal, tortious or injurious act; rather, he dwelt on an invalid, superceded section of the District of Columbia Code.

In the ruling prohibiting the admission of the tape recordings (see page 5 of the Petition for a Writ of Certiorari) the Court stated:

> Now there are variations and implications as in every case so it could be argued as you do here that a beep tone puts him on notice so you don't have to tell him, but a beep tone could mean a lot of things.

The trial judge's clerk later explained to the

petitioner that the judge, in yet another demonstration of his bias against the petitioner, had in mind the possibility that the beep tones could be dubbed onto the tapes after the conversations were recorded. However Frommhagen submits that even under those circumstances the recording by one party of a telephone conversation without the consent of the other party would be permissible if there was no intent on the part of the recording party to commit a criminal, tortious or injurious act. Such an act might be in violation of the tariffs of the local telephone company. However, as an official of the Chesapeake and Potomac Telephone Company said after the disclosure that President Richard M. Nixon had been recording telephone conversation without the knowledge or consent of the other parties to the conversations (as reported in The San Francisco Chornicle, July 17, 1973, page 18):

> Normally if we discovered such a violation we'd notify the customer and ask him to stop doing it. I suppose if they continued the recording we could remove their phones. But I don't know what we would do about the the White House.

It is reiterated that Frommhagen violated no federal or state statute or regulation. Indeed the trial judge refused to make even a preliminary inquiry as to whether there had been a violation of a local tariff just as he refused to consider any of Frommhagen's arguments. The trial judge had decided to accept Scott's uncorroborated testimony as to the content of those telephone conversations and he would brook no impeachment of that testimony.

II. THE RESPONDENT AND THE COURT WERE AWARE OF THE RECORDINGS OF THE TELEPHONE CONVERSATIONS BEFORE THE TRIAL COMMENCED.

The attention of this Court is directed to the following remarkable exchange between the Court and Frommhagen as it appears on page 19, at line 22 through page 20, at line 5, of the Reporter's Transcript (included in

the Record transmitted to this Court):

> THE COURT: All right. What position do you take?
> MR. STILLEY: This moment is the first time I have ever heard of such a thing. [the tape recordings]
> THE COURT: He didn't mention it at pretrial?
> MR. FROMMHAGEN: I didn't mention it formally at pretrial, but I think as Mr. Stilley told you this morning he certainly heard from me last Tuesday.
> THE COURT: No one told me until I asked you about it this morning.....

How could the trial judge possibly have known about tape recordings of telephone conversations to have asked Frommhagen about those recordings that morning (before the trial commenced) unless he had been told about them first. The answer is that the attorney for respondent, Mr. Stilley, knew about those tape recordings for some considerable time before the trial and yet he failed to make any discovery along that line; in fact, he cancelled a deposition from petitioner before the trial. With an apparent anxiety Mr. Stilley asked the trial judge on the morning before the trial commenced to suppress those recordings. The trial and appellate judges, desirous of protecting a brother-attorney, and on the most fallacious grounds, obliged by suppressing those recordings which would have impeached completely Scott's de novo testimony at the trial.

Yet another exchange between the Court and Frommhagen reveals the bias of the trial judge, as shown on page 20, line 19 through page 21, line 2, of the same Reporter's Transcript:

> THE COURT: Well, what was your reason for not clearing this the tape recordings with pretrial judge since obviously a great deal of thought was given to stipulations and identifications and evidence. Why not this item?
> MR. FROMMHAGEN: I think, Your Honor,

> this is in the nature, isn't it, of impeachment testimony or impeachment evidence which is not required to be divulged at pre-trial?
> THE COURT: Do you happen to know what the Federal Communications Commission rules are on recording telephone calls?

It will be noted that the Court did not answer the question posed by Frommhagen, but quickly changed the subject to regulations of the Federal Communications Commission. The trial judge must have known that it is the long-established and eminently reasonable rule of the District of Columbia courts, as well as many other courts, that impeachment evidence need not be divulged at pre-trial proceedings. Frommhagen did not reveal the tape recordings at the pre-trial hearing because he believed that Scott, true to form, would distort in his testimony some aspects of the content of the telephone conversations. As it did indeed develop, Scott testified perjurously during the trial that certain disputes involving the payment of fees and court costs took place between him and the petitioner during the subject telephone conversations; the tape recordings would have proven that no such disputes had taken place and that, in fact, Scott assured Frommhagen that he was preparing the petition for writ of certiorari and would have that petition filed in time with the Clerk of the United States Supreme Court. Scott sought to coverup his default with disputes that never took place, and the Court permitted him to do so.

III. THE CONSIDERABLE DECLINE IN THE ETHICAL STANDARDS OF THE LEGAL PROFESSION IS TRACEABLE IN LARGE PART TO THE ABSENCE OF ADEQUATE GRIEVANCE PROCEDURES AND THE WILLINGNESS OF MANY ATTORNEYS TO DISREGARD THE IMPROPRITIES OF THEIR ASSOCIATES.

Frommhagen believes fervently that this matter is just one more example of the unwillingness of bar associations and of the brother-attorneys who sit as

judges to insist that the ethical standards of the profession be maintained.

Mr. Justice Harry A. Blackmun, taking note of the many attorneys involved in the Watergate scandal and the growing lack of faith in the legal community on the part of the American public, admonished the delegates at the convention of the American Bar Association on August 5, 1973, to rededicate themselves to the high ethical standards for which the legal profession stands.

The problem is not confined to the legal community as shown in a forceful editorial in a recent issue of the American Medical Association Journal. That editorial was summarized in an article appearing in the San Francisco Examiner-Chronicle on November 4, 1973, excerpts of which follow:

> Abuse by practicing physicians in the United States ordinarily would be dealt with through the local medical societies or state medical examiners. In recent years, however, the American Medical Association had noted an increasing spate of complaints that professional ethics had lapsed....
> "Medical societes appear to have been reluctant to tackle tough problems relating to questionable actions by their members," charged the secretary of the AMA's Judicial Council on Medical Ethics, Edwin J. Holman. "It is amazing," he wrote, "how many excuses can be found for not conducting an investigation or for not taking action."
> He told The Times, state boards of medical examiners too often failed to judge or punish their colleagues for alleged malpractice. The rationale, he said, for not carrying out their duty was usually a reluctance to question the judgment of their fellow practioners or a fear of legal suit by doctors who might have been questioned regarding their professional conduct.

> "Neither excuse is more than that," Holman had written- "it is merely an excuse."

Petitioner respectfully submits that all of the foregoing statements apply equally to the legal profession.

The petition herein, this supplemental brief, and the Record transmitted to this Court demonstrate that Frommhagen was placed in a double-bind situation wherein the Grievance Committee and the Superior Court each insisted that he go to the other agency with his evidence, but neither agency would admit that evidence and both agencies insulated their proceeding from the other. Furthermore, the Court permitted Scott on the pretext of a $50,000 libel suit directed to petitioner's grievance complaint, to escalate the matter from the Small Claims Court to the Superior Court by way of attempting to intimidate Frommhagen, and then allowed Scott to engage in any number of delaying tatics. It is little wonder that so many in the general public have so little respect for the legal profession and the courts.

Petitioner realized from the beginning that it is almost impossible to have a grievance complaint adjudicated fairly and expediously, unless it involves a major malfeasance which has received widespread public attention. As a NASA employee he posted serious grievances against the top management of NASA, only to be fired after he had won those hard-fought grievance proceedings; he has similarly filed grievances as a consumer and as a member of a real estate association. All of those proceedings were marked by an obsessive concern of the profession or the business to protect itself even at the risk of damaging or destroying their standards; that trend appears to be accelerating.

Frommhagen has gone to great trouble and expense to perfect this matter for the consideration of this Court. He can go no further, and can only hope and trust that this Court, perhaps by way of expressing its concern for the efficacy and integrity of

those procedures whereby the standards of the profession are maintained, will review this matter and provide relief.

Dated: November 8, 1973, Soquel, California

Respectfully submitted,

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